INDEX

	Page
1. The New Interpretations of § 10(a) Now Advanced Constitute Additional Reason for Granting a Writ	2
2. The Contention That the Commission's Decision is Not Reviewable is Insupportable and Cannot Stand in the Way of a Writ	5
3. The Commencement of Construction of Brownlee Dam is Not a Valid Consideration in the Disposition of the Petition	6
4. The Government's Attempted Justification of the Decisions Below is Predicated on Misrepresentations of the Basic Issue Presented, the Purpose of the Act, the Function of the Commission and Petitioner's Contentions, and on Other Erroneous or Misleading Statements	7
5. The Government's Position on Other Questions Presented Misconstrues Petitioners' Contentions, Misrepresents the Facts and Misapplies the Law	16
Conclusion	16

CITATIONS OF CASES AND DOCUMENTS

CASES:

Baltimore & Ohio RR. Co. v. U.S., 264 U.S. 258	7
Capital Transit v. U.S., 97 F. Supp. 614	16
Chapman v. FPC, F.P.C., 345 U.S. 153	3, 4, 11, 12, 14
National Broadcasting Co. v. U.S., 319 U.S. 190	5
N.Y. Central Securities Corp. v. U.S., 287 U.S. 12	5
South Carolina Public Service Authority v. F.P.C., 170 F. 2nd 948 cert. den. 336 U.S. 953	7
U.S. v. Pierce Auto Lines, 327 U.S. 515	16

STATUTES AND RULES:

Federal Power Act, 16 U.S.C. §§ 791 *et seq.*

§ 7(b)	5, 6, 9, 12, 15
§ 10(a)	2, 3, 4, 5, 9, 15, 16
§ 13	16
§ 313(b)	5

Page

Administrative Procedure Act, 5 U.S.C. §§ 1001 *et seq.*

§ 7(d) 16
§ 8(b) 16

MISCELLANEOUS:

House Document 531, 81st Cong. 2d Sess., Vol. I .. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., *et al.*,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

REPLY BRIEF FOR PETITIONERS

Neither the Government's brief nor that of Idaho Power Company denies the reasons cited by petitioners for granting the writ which, in accordance with Rule 19(b), relate to the importance of the statutory questions presented and the importance of the case to the

economy and future of the Pacific Northwest and the Nation as a whole.

The Company primarily argues the merits of the questions presented; it seems also to argue that the Commission's decision is entirely within its discretion and is, therefore, not subject to judicial review; but that, in any event, review would involve this Court in consideration of complicated technical factors reserved by Congress for expert determination by the Commission.

The Government makes a similar argument. In addition, it attempts to show that the decisions below are correct. In order to do so, however, the Government misrepresents the basic issue presented by petitioners, the purpose of the Federal Power Act, the function of the Federal Power Commission, and many of petitioners' contentions. The Government's brief contains still other erroneous and misleading statements. As to the issues raised other than under § 10(a) and § 7(b) of the Federal Power Act, the Government argues their merits.

Comments on these points follow, with particular reference to the Government's brief. In order that this Court may have the issues presented clearly before it when ruling upon the petition, the most patent of the Government's misstatements are noted below in point 4.

1. The New Interpretations of § 10(a) Now Advanced Constitute Additional Reason for Granting a Writ

The Government contends that the only comprehensive plan in existence for the Columbia River Basin (which it erroneously represents as being the Army's 1948 plan rather than the coordinated Army-Interior 1950 plan) is not even *prima facie* the comprehensive

plan that should have been used in the application of § 10(a) because the plan has not been approved or adopted by Congress (Govt. Br. 21-22)[1] This contention has never before been made by the Commission; in fact, it contradicts the lip service paid the so-called Main Control Plan in the Commission's decision below. This contention is advanced now for the apparent purpose of bolstering the decision of the Court below which, in an attempt to apply this Court's decision in *Roanoke Rapids,* 345 U.S. 153, erroneously assumed that all comprehensive river-basin plans are customarily presented by the Corps to Congress for approval or adoption (Pet. App. B 12, 15).

That is simply not the case and never has been for the Columbia River Basin. Instead, projects included in the Columbia Basin plan have been presented to Congress for individual authorization. Approval of the plan itself has never been requested.[2] Even more meaningful than bare approval or adoption of a comprehensive plan, petitioners submit, is Congressional implementation of the Columbia Basin plan to the extent of an ultimate Federal investment of at least $2.5 billion (Pet. 6, Fn. 1).

In order to justify its total rejection of the only existing comprehensive plan for the Columbia Basin, the Government says that the statutory licensing criteria are the beneficial public uses recited in § 10(a), and that the Commission's function is to determine whether a proposed project will be ". . . best adapted

---

[1] The Company contends that a "comprehensive plan" must be "approved, adopted or *authorized*" (Emphasis supplied) (IPC Br. 2, 12).

[2] See H. Doc. 531, 81st Cong., 2d Sess., Vol. I, pp. VI, VII-IX.

to a comprehensive plan for the fulfillment" of such criteria (Govt. Br. 20; but see IPC Br. 10)

The intent of the Government's studied reversal of the sequence of the statutory language is not clear. Its effect would appear to be a serious de-emphasis of the concept of basin-wide comprehensive planning which has never before been challenged as the fundamental element of § 10(a).[1] If this interpretation is accepted as correct, the result must be a complete re-writing of the statutory language in derogation of the entire legislative history of the term "comprehensive plan", in effect permitting project-by-project development of a "plan" on an *ad hoc* basis, with no consideration to the over-all optimum development of the resources of a river basin.[2]

In any event, the urging of such a novel interpretation at this stage of this controversy clearly constitutes one more valid reason for the full consideration of the problem by this Court, which can only be obtained by the granting of the writ of certiorari requested by petitioners.[3]

---

[1] This interpretation is contrary to that suggested by this Court in *Roanoke Rapids* (at 168-9).

[2] The importance of federal river-basin plans to the orderly administration of State laws is emphasized in the *amicus* brief filed in support of the petition by the State of Oregon, viz:

> "The Constitution reserves to the Federal Government paramount responsibility for comprehensive development of the Columbia Basin. Without authorization from the Congress, Oregon . . . cannot successfully assert effective control over reclamation, navigation and hydro-electric development on the Columbia and its tributaries." (Oregon Br. 7).

[3] The Company construes the statutory term "comprehensive plan" as meaning any adopted, authorized or approved "plan specifying a dam of any type or character in this [Hells Canyon] reach of the river." (IPC Br. 12).

2. The Contention That the Commission's Decision Is Not Reviewable Is Insupportable and Cannot Stand in the Way of a Writ

The Government asserts that the Commission's discretion under § 7(b) is unfettered by "detailed standards or criteria" and, accordingly, its refusal to make a recommendation to Congress for federal development was a decision reserved "solely for the judgment of the Commission." (Govt. Br. 14-16).[2]

This constriction of judicial review contravenes specific provisions of the Federal Power Act (16 U.S.C. 825 (1) (b)). The assertion of uninhibited authority under § 7(b) is without precedent. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, cited by the Government (Govt. Br. 16), as well as the authorities cited within that case, bore specifically on the question of the *constitutionality* of Congressional delegations of power conditioned on a statutory yardstick of "public convenience, interest or necessity," or simply "public interest". No such constitutional question is here presented. Moreover, the cited case points out that the naked language of a statutory standard does not serve as the sole limitation on administrative action (at 326):

> "The purpose of the Act, the requirement it imposes and the context of the provision . . . show the contrary."

New York Central Securities Corp. v. *United States,* 287 U.S. 12, considered controlling in *National Broadcasting Co.* v. *United States, supra,* recognizes the legislative objective as a fixed limitation on adminis-

[2] The Company seems to take this position not only as to § 7(b) but as to § 10(a) too (IPC Br. 9-11).

trative action, and thus further refutes the contentions that the Commission's discretion has in some way been enlarged to that.

The Government's very reliance on authorities such as these underscores the need for a determination by this Court of the meaning of the statutory priority for public development incorporated in § 7, specifically the priority for federal development in § 7(b).

Pointing to the "complex, specialized and highly technical" factors involved in the Commission's decision, the Government again—in still another way—attempts to enlarge the Commission's authority under § 7(b) into uncontrolled license and correspondingly to delimit the scope of judicial review (Govt. Br. 15).[1] Even if there were merit in the argument that the technical factors underlying the Commission's decisions were too complex for the courts, the fact is that petitioners are not asking this Court to review the technical and other factual determinations below. All that is requested is that the Court correct the erroneous statutory interpretations below.

3. The Commencement of Construction of Brownlee Dam Is Not a Valid Consideration in the Disposition of the Petition

The Government seems to argue—albeit obliquely—that this case is virtually mooted because the Company allegedly has already expended $15 million at the Brownlee dam site. Petitioners are frankly disturbed that the Federal Government should attempt to inject into this case new testimony outside the record, in the form of a gratuitous and wholly insupportable state-

[1] And see IPC Br. 7-9.

ment, in a footnote, to the effect that the Brownlee project is already 40% complete (Govt. Br. 12, Fn. 10).[1] Not even the Company makes this claim.

However, the jurisdiction of this Court to review the decisions below cannot be defeated by the Company's headlong race with the judicial process (see Pet. 9). Cf. *South Carolina Public Service Authority* v. *Federal Power Commission,* 170 F. 2nd 948, cert. den. 336 U.S. 953; *Baltimore & Ohio Railroad Company* v. *United States,* 264 U.S. 258.

4. The Government's Attempted Justification of the Decisions Below Is Predicated on Misrepresentations of the Basic Issue Presented, the purpose of the Act, the Function of the Commission and Petitioners' Contentions, and on Other Erroneous or Misleading Statements

The Government misrepresents the basic issue in this case as being federal vs. non-federal development (Govt. Br. 15, 18). Petitioners have never made this contention. The Government's characterization is a distortion of the real issue—full multi-purpose development of water resources vs. wasteful underdevelopment (Pet. 2-3, 10, 18, 20-21, 24-27)—and a distortion most inclined to bring false ideological issues into the controversy.

Petitioners favor the high dam because it means maximum development. Petitioners oppose the three-dam plan, not because it is proposed for non-federal development, but because it means under-development,

---

[1] An expenditure of $15,000,000—even if this allegation is accurate—obviously could not result in 40% completion of a dam estimated by the Company to cost $63.5 million and by the Commission staff, $87.8 million.

in contravention of the whole purpose and spirit of the Federal Power Act. The Government's formulation of the basic issue can be refuted simply by pointing to the immense diversity of the founders and members of the National Hells Canyon Association, Inc. (see Pet. 7); their only common characteristic is a sincere interest in the full development and true conservation of the great water resources of the Pacific Northwest.

The purposes of the Act are also misrepresented by the Government. They are erroneously described as seeking to encourage the "comprehensive development of *power* resources" (Emphasis supplied) (Govt. Br. 14). On its face, the Act seeks multi-purpose development, not merely power resource development.

Moreover, the Government overstates the Commission's function in the field of water resources development. Rather than being the agency solely responsible for the development for hydroelectric production, as the Government would seem to want this Court to believe (Govt. Br. 22), the Commission is merely a participating agency, along with several other Federal, State and local agencies, in the preparation of comprehensive multi-purpose river basin plans (see Pet. 12-13). Primary responsibility for these plans rests with the Corps of Engineers and to some extent with the Bureau of Reclamation. Nor is it the function of the Commission "to formulate . . . general power policy", as the Government asserts (Govt. Br. 22). If, in fact, the Commission believes that it has this function, it is admittedly invading the legislative field and its decision here all the more requires review by this Court.

In important respects, the Government misrepresents the petitioners' contentions. Thus, it presumes that petitioners accept the Commission's findings as to the comparative merits of the three-dam and high dam proposals (Govt. Br. 13). Petitioners do accept such findings of the Commission—as far as they go. But where these findings do not disclose quantitative differences—as in the case of power output; or the range of quantitative differences—as in the case of flood control benefits; or where findings are lacking—as with respect to most of the indirect economic benefits, petitioners look to the unrefuted findings of the Presiding Examiner.

The Government also misrepresents the specific issues raised by petitioners under § 10(a) and § 7(b). It asserts that petitioners are questioning the adequacy and clarity of the standards in § 10(a) and § 7(b), whereas, as is plain from the petition, petitioners are questioning the propriety of the interpretations of these standards below (Govt. Br. 14, 19; Pet. 17-18, 23).[1]

Other erroneous or misleading statements contained in the Government's brief include the following:

1. ". . . the construction by the United States of a high Hells Canyon project as *suggested* in 1948 by the Army Corps of Engineers . . ." (Emphasis supplied) (Govt. Br. 4).

---

[1] See also IPC Br. 2, 11, 14. To decide these questions of statutory interpretation does not require that this Court either legislate or tell the Commission what its judgment should have been under § 10(a) and § 7(b), as the Company contends.

The high Hells Canyon dam was specifically *recommended* for congressional authorization by the Secretaries of Army and Interior in 1950 (Govt. Br. 21-22).

2. "Accordingly, the Commission concluded that *the objects* (sic) of the main control plan could be achieved 'by a number of different combinations of projects . . .' " (Govt. Br. 6-7).

The Commission's conclusion that the objectives of the Main Control Plan could be achieved "by a number of different combinations of projects . . ." related solely to the flood control objective. It held out no such solution for other objectives of that phase of the ultimate comprehensive plan, and *especially not for the power objective* (Pet. App. 28; IPC Br. 5; Pet. 16).

3. "In this regard, the Commission adverted to the estimates of record showing that the output of the three developments would be fully utilized in Idaho Power's own system by about 1975." (Govt. Br. 11).

The brief fails to mention the Commission's conclusion that one of the three dams may never be built for lack of a market in the Company's service area (Pet. 11, 27; Pet. App. C 39).

4. "Since petitioners did not initially request the court to stay the Commission's orders, Idaho Power proceeded with the construction of the Brownlee dam." (Govt. Br. 12, Fn. 10).

The causal connection implied by the Government is conjectural and unsupported. The Company's own explanation is different (IPC Br. 4; see also Pet. 9).

5. "But these findings, either alone or together with the accompanying opinion of the Commission, reveal

beyond any doubt that the Commission found that the high dam produced greater benefits *solely* in the area of flood storage capacity and that, in other respects, the difference was either too slight to consider (Fdgs. 12, 14, 17, 21) or, in the case of power production, the incremental energy production of the high dam would cost as much to produce as it would be worth (Fdg. 18) . . ." (Govt. Br. 13, Fn. 11).

This statement obscures the substantial differences in the quantity of power benefits from the three-dam and high dam proposals and does not deny that the attainment of the greater power benefits from the high dam is economically feasible by federal standards (Pet. 6-7).

6. "As enacted, and as administered for over 35 years, the Act seeks to encourage the *immediate and* comprehensive development of *power* resources by public or private agencies under such regulation as to protect every *legitimate* public interest. The *Roanoke Rapids* case, 345 U.S. 153, 168." (Emphasis supplied) (Govt. Br. 14).

Neither the legislative nor the administrative history of the Act point to a sacrifice of comprehensive development in favor of immediacy; as already noted, the Act seeks multi-purpose development, not solely power development; what public interest, if any, was intended to be excluded by the phrase "every legitimate public interest", is not indicated. *Roanoke Rapids* is not authority for the Government's contentions (See Pet. 15, 22-23).

7. "In dealing with the *comparable contention* in *Roanoke Rapids* . . . this Court wrote . . ." (Emphasis supplied) (Govt. Br. 15).

The contention before the Court in *Roanoke Rapids* where the private project virtually matched the proposed federal project, cannot in any sense be considered comparable to that made herein, where the differences between the contending proposals constitute the very basis of this controversy (Pet. 21, 23; Pet. App. E 153).

8. "The Commission has recommended federal development to Congress under Section 7(b) only once . . ." (Govt. Br. 15, Fn. 12).

The Government fails to explain that prior to this case the Commission has passed on very few license applications for construction of lesser projects in conflict with multipurpose projects proposed for federal construction.

9. "Petitioners argue that the substantially higher cost of high Hells Canyon, as compared to the three-dam proposal, *should not have been considered* . . . petitioners forget that cost is a necessary element in determining the cost-benefit ratio, the market potential, and the relative economic feasibility of the projects to be compared. Section 7(b) certainly did not contemplate that the Commission would recommend *economically impractical* projects and thereby advise the dissipation of public monies." (Emphasis supplied) (Govt. Br. 17; IPC Br. 7-8).

Correctly stated, petitioners' position is that the comparative capital costs of the two proposals are irrelevant where both proposals are economically feasible—a conclusion which necessarily reflects the fact that the substantially higher cost of the high dam is justified by its substantially larger revenue-producing (i.e. power) benefits. Nowhere before has the Gov-

ernment contended that the high dam was economically impractical. The Commission's licensing order, in fact, finds the contrary (Pet. App. C 36, 50, Fdg. 18; see also E 142-44).

10. ". . . petitioners appear also to urge that *controlling* significance should have been afforded to the alleged fact that federal financing would have better served certain broad economic purposes . . ." (Govt. Br. 18; IPC Br. 8).

Petitioners refer to the benefits from lower cost federal power only as "significant factors" to be weighed as "public purposes" (Pet. 18; see Pet. App. C 26).

11. ". . . these indirect benefits would result not from the alleged superiority of the high Hells Canyon project but rather from the superior credit and tax position of the Government . . ." (Govt. Br. 19, Fn. 16).

The indirect benefits of which the Commission took note, as well as others found by the Examiner, are not the result alone of the "superior credit and tax position" of the Government but also of the larger quantity of power that would be available (Pet. 7).

12. ". . . the recommendations of the Army Engineers were themselves modified by the Bureau of Reclamation of the Department of the Interior (Govt. Br. 21-22).

The "modification" referred to was not unilateral action, but joint agreement of the Secretaries of the Army and the Interior pursuant to Presidential directive (Pet. 14, Pet. App. E 124-125, 158, Fdgs. 58, 61).

13. ". . . since Congress first authorized the Corps of Engineers to prepare comprehensive plans in 1927 (see Pet. 13), it could hardly have referred to the plans so prepared, or intended them to be binding upon the Commission, when it enacted the Federal Water Power Act in 1920 and first used the term 'a comprehensive plan' " (Govt. Br. 22).

The legislative history of the Act makes abundantly clear that in 1920 the Congress did contemplate the preparation of such plans for the guidance of the Commission (Pet. 13).

14. "It is the Commission, not the Corps of Engineers, which Congress established as its 'permanent disinterested expert agency' *to formulate* and carry out general power policy. 345 U.S. at 167, 168 . . ." (Emphasis supplied) (Govt. Br. 22-23).

This statement misrepresents the enclosed quotation from the *Roanoke Rapids* decision. The exact quotation reads: "the permanent disinterested expert agency of Congress to *carry out* these [water-power] policies" (Emphasis supplied).

15. "This is not to say that substantial weight was not attached, in this case, to the recommendations of the Corps of Engineers" (Govt. Br. 23).

The implication that substantial weight was given by the Commission and the court below to the so-called Main Control Plan and its multi-purpose objectives is erroneous (Pet. 12, 16).

16. ". . . the three-dam plan . . . could *substantially equal* the benefits of the high dam in *every other* respect, would provide *somewhat less* storage capacity for flood control purposes" (Emphasis supplied) (Govt. Br. 23).

In its licensing decision, however, the Commission thought the storage differential between the two projects was sufficiently large to warrant the statement that "an additional amount of flood control storage would have to be provided elsewhere" (Pet. App. C 28-29); also, the Court below referred to the ". . . public benefits in somewhat greater quantity . . . " from the high dam (Pet. App. B 14; and see Pet. 16).

17. "On the whole, the Commission was 'convinced that the immediate construction of the Brownlee project would be consistent with the Army's *present* plans' " (Emphasis supplied) (Govt. Br. 23).

In juxtaposition to the immediately preceding sentence, this statement erroneously implies that the Army's present plans (in terms of quantitative multipurpose objectives) are different from its so-called Main Control Plan. The objectives of that plan have not been modified (See Pet. App. E 160, Fdg. 69).

18. ". . . it is a common practice to compare alternative proposals on this basis [of identical financing] and, in fact, such comparisons were utilized by the Corps of Engineers . . ." (Govt. Br. 25).

This is common practice only when comparing alternate proposals for Federal development; there is no precedent for such comparison for purposes of § 10(a) (See Pet. App. E 140-42).

19. "Once a decision has been made against recommending federal construction under § 7(b), the determination under § 10(a) must necessarily be in terms of private development and the attainment, on the basis of private financing, of those fundamental engineering objectives subsumed in the requirement of comprehensive development" (Govt. Br. 25).

Any implication from the context that the Commission's determination under § 10(a) relied on a comparison based on private development is erroneous (Pet. 11-12; Pet. App. C 31-32, 34, 36, 50, Fdg. 18).

5. The Government's Position on Other Questions Presented Misconstrues Petitioners' Contentions, Misrepresents the Facts and Misapplies the Law

a. The Government's position regarding the issue under § 13 of the Federal Power Act is contrary to fact and law (Govt. Br. 26; Pet. App. B 17-18, C 39-40; Pet. 28).

b. The Government's position regarding the Commission's failure to make the findings necessary to satisfy § 8(b) of the Administrative Procedure Act misconstrues petitioners' contention and is contrary to law (Govt. Br. 27-28).

Petitioners' contention is simply that conclusions necessary for adequate judicial review are not to be found in the licensing order. The significance of these missing findings cuts far deeper than any failure to include in the order supporting evidence for the findings made (Pet. 28-29). The cases cited by the Government, in fact, support rather than refute petitioners' contention. See *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 525; *Capital Transit* v. *United States*, 97 F. Supp. 614, 621.

c. The Government's position regarding the alleged violation of § 7(d) of the Administrative Procedure Act seems to confirm petitioners' contention in the very process of trying to refute it. Thus the Government's brief says: " . . . the 'adjusted' analyses of the evidence . . . were merely analyses of record evidence *plus appropriate adjustments* . . . "(Emphasis

supplied) (Govt. Br. 28). In apparent contradiction of itself, the Government also says: "In utilizing these 'adjusted' analyses, the Commission did not go outside the record, since *all data* utilized by it are *from the record*" (Emphasis supplied) (Govt. Br. 28).

The assertion that petitioners could not have been prejudiced by such an excursion beyond the record is erroneous. Regardless of the effect of the "adjusted" analyses on the economics of the high dam, they simultaneously colored the economics of the 3-dam proposal.

d. The Government's argument as to the *ex parte* post-license order of November 3, 1955 fails to explain that petitioners had been intervenors in the proceedings for fully two years at the time of the filing of the drawings; and that nevertheless they were denied even service of copies of these revised drawings (Pet. 29-30; Pet. App. D).

CONCLUSION

For the foregoing reasons, additional to those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

EVELYN N. COOPER
Counsel for Petitioners
1025 Connecticut Ave., N.W.
Washington 6, D. C.

March 27, 1957.